[2024] JMSC Civ 183

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

FAMILY DIVISION

CLAIM NO. SU2024FD02829

IN THE MATTER OF SECTIONS 2, 3 AND 29 OF THE MENTAL HEALTH ACT

AND

IN THE MATTER OF THE JUDICATURE (SUPREME COURT) ACT

AND

IN THE MATTER OF AN APPLICATION BY PVS AND HG FOR THE EXERCISE OF JURISDICTION BY THIS HONOURABLE COURT OVER THE MANAGEMENT OF THE PROPERTY AND AFFAIRS OF VRS

RE: A PATIENT VRS

IN CHAMBERS VIA VIDEO CONFERENCE

Ms. Sherry-Ann McGregor instructed by Nunes, Scholefield, DeLeon & Co appeared for the Claimants, Mrs. PVS and Mrs. HG.

Heard: **10th October, 12th and 14th November 2024**

Family Law – Mental Health Act – Managing the Affairs of a Patient under the Mental Health Act – Nearest Relative – Examining Medical Evidence Presented – Mental Health Act sections 2, 3 and 29

CORAM: A. MARTIN-SWABY, J (ag.)

BACKGROUND

[1] Mr. VRS is currently eighty (80) years old and has been married to Mrs. PVS for the past fifty-six (56) years. They share two (2) children, Mrs. HG who resides in

Jamaica, and Mr. GS who resides in the United States of America. Prior to 2019, Mr. VRS was in good health, but his mental health thereafter started to decline.

[2] He was first evaluated by Dr. Alfred Chen, a Consultant Clinical Gerontologist, on the 25th of June 2021 and was assessed as having a progressive degenerative disease of the brain that affects memory, thinking, language and general cognitive functions which may progress to dementia. A second evaluation was done on the 9th of November 2023 and it was determined that his condition had deteriorated to moderately severe dementia.

[3] Mr. VRS' declining condition has resulted in his wife Mrs. PVS and his daughter Mrs. HG filing a Fixed Date Claim Form on the 21st of August 2024 seeking to be appointed as having the requisite loci to manage his affairs. The orders sought are as follows: -

> *1. A declaration that [VRS] is a patient within the meaning of section 2 of the Mental Health Act.*
>
> *2. A declaration that the Claimants, being wife and daughter respectively, of [VRS] are two of his nearest relatives within the meaning of Section 3 of the Mental Health Act.*
>
> *3. An order that the Claimants are authorized jointly and/or severally, to do all such things that appear to be necessary or expedient in accordance with section 29(3) of the Mental Health Act in the interest of and for the maintenance and benefit of [VRS].*
>
> *4. Such further and/or other relief as this Honourable Court deems just.*

SUBMISSIONS

[4] The court was most grateful for the very forensic and analytical oral and written submissions of Counsel, Ms. Sherry-Ann McGregor. The court will briefly state the position of Ms. McGregor here, but will examine her submissions in greater detail when it examines the pertinent issues of this case.

[5] Ms. McGregor indicated that in applications of this nature the most important evidentiary material to be considered is medical in nature. She submitted that where the

court is satisfied that the medical evidence meets the required threshold under the Civil Procedure Rules ("CPR"), and further that the parties qualify as being the nearest relatives of the patient, the order may be granted. Counsel further invited this court to find that the medical report which was presented in this case, when read together with the affidavits of Mrs. PVS and Mrs. HG, as well as that of the disinterested practical nurse, are sufficient for the court to find, on a balance of probabilities, that Mr. VRS is a patient under the Mental Health Act and is incapable of managing his affairs.

ISSUES

[6] By virtue of the above, it is pellucid that the principal issues to be distilled and determined are: -

a. Whether Mr. VRS is a patient within the parameters of the definition of this term under section 2 of the Mental Health Act?

b. Whether there is sufficient medical evidence and otherwise that Mr. VRS is incapable by reason of a mental disorder of managing and administering his property and affairs?

c. Whether Mrs. PVS and/ or Mrs. HG are the nearest relatives for the purposes of section 3 of the Mental Health Act?

LAW AND ANALYSIS

Whether VRS is a patient within the parameters of the definition of this term under section 2 of the Mental Health Act?

[7] In evaluating the core issue before this court, that is whether Mr. VRS is to be considered a patient under section 2 of the Mental Health Act, the court must be satisfied, to the requisite standard, that he falls within the definition outlined within the statute. Section 2 of the Mental Health Act defines a patient as:

> *"means a person who is suffering from or is suspected to be suffering from a mental disorder".*

[emphasis mine]

[8] The section goes further to define a mental disorder as:

> *"(a) a substantial disorder of thought, perception, orientation or memory which grossly impairs a person's behaviour, judgment, capacity to recognize reality or ability to meet the demands of life which renders a person to be of unsound mind; or*
>
> *(b) mental retardation where such a condition is associated with abnormally aggressive or seriously irresponsible behaviour..."*

[9] The wording in section 2 of the Mental Health Act indicates that a patient includes a person "who is **suspected** of suffering from a mental disorder" in addition to someone "who **is** suffering from a mental disorder". The court's understanding of this is that there is no need for a diagnosis from a medical professional for a person to qualify as a patient for the purposes of section 2 of the legislation.

[10] The approach taken by the legislation in this regard is reasonable and practical as the provisions within the statute, as a whole, are far reaching and treat with the detention of persons to psychiatric facilities and a host of provisions which serve the interest of persons who are not only diagnosed with a mental disorder but who also are suspected of being of unsound mind.

[11] Counsel in her submissions invited the court to consider the Court of Appeal decision of **Sharon Pottinger v Keith Anderson** [2013] JMCA App 35 ("**Sharon Pottinger**"). This two-pronged approach to the definition of patient was ventilated in this decision and it is useful for the purposes of these discussions.

[12] In **Sharon Pottinger**, a claim was brought by the Respondent, Mr. Keith Alexander, against the mother of the Applicant, Ms. Sharon Pottinger, for breaches of the Copyright Act. A default judgment having been entered against Ms. Pottinger, an application was brought seeking to set aside the default judgment on the basis that Ms. Pottinger was a patient within section 2 of the Mental Health Act. Medical evidence was placed before the Court in the form of two (2) letters which were prepared by medical practitioners. This application was refused by D.O. McIntosh J (as he then was).

Consequently, an application for leave to appeal the decision of the learned Judge was made before the Court of Appeal.

[13] A critical issue before the Court of Appeal was whether the medical evidence which was presented was sufficient to satisfy the threshold under section 2 of the Mental Health Act. Phillips JA (as she then was), in delivering the majority ruling on the issue as to whether leave to appeal would be granted, discussed the two (2) thresholds as presented in section 2 as follows at paragraphs [42] and [43] of the judgment. The relevant portions of which have been reflected below:

> *[42] Part 23 of the CPR provides that "patient" is to be given the meaning ascribed to it in the Mental Health Act. Section 2 of the Act provides that a patient is one suffering from or is suspected to be suffering from a mental disorder. "Mental disorder" is defined as:*
>
> > *"(a) a substantial disorder of thought, perception, orientation or memory which grossly impairs a person's behaviour, judgment, capacity to recognize reality or ability to meet the demands of life which renders a person to be of unsound mind; or*
> >
> > *(b) mental retardation where such a condition is associated with abnormally aggressive or seriously irresponsible behaviour, …"*
>
> *From the section, it may be said that in making the determination of whether a person is a patient and for the purpose of litigation, one who is in need of a next friend to protect his/her interest, it is not sufficient that there is suspected or found to be a disorder of thought or perception, orientation or memory: the nature of this disorder must be so substantial as to grossly impair the behaviour, judgment and capacity to recognize as to render the relevant person as being of an unsound mind. Such a condition is one that affects the mental health of a person and it may follow that any argument that a particular health issue or condition falls within that description would invite some medical evidence upon which such an assessment can be made. In this case, there were medical certificates in respect of Alzheimer's disease and so, on appeal, it would have to be considered what weight should be given to the information contained therein, particularly in circumstances where there appears to be conflicting evidence as to the mental capacity of Sonia Pottinger and the respondent is contending that there are varying stages of the disease which affect the extent of the mental capacity of the person suffering from the disease. And so, it may well be that there could be a finding that the information establishes the existence of Alzheimer's disease, but that it does not provide a sufficient basis upon which to conclude that Sonia Pottinger was of unsound mind for the purposes of part 23.*

> *[43] **It is significant that the section also provides that a person may be regarded as a patient where he is suspected to be suffering from a mental disorder that renders him to be of unsound mind. This, it would seem to me, raises questions as to the nature of the evidence that is required for there to be an assessment as to whether a person is suspected of suffering such a mental disorder. It is arguable that the evidence would be at a lower threshold than where it is to be concluded that the person is suffering from a mental disorder which renders him to be of unsound mind. Would this assessment admit evidence from persons who are not medical practitioners? Must their assessment have its basis on medical evidence?** Was the evidence upon which the applicant relied sufficient to meet this threshold of being suspected of being of unsound mind. In my view, a court could well find that there was sufficient evidence that Sonia Pottinger was suspected to be of unsound mind and therefore that the judgment could only have been entered with permission. The applicant therefore has a realistic prospect of succeeding on this issue."*
>
> [emphasis mine]

[14] Phillips JA was of the view that on the basis of what was presented, there was a realistic prospect of the appeal succeeding bearing in mind that "a patient" under the Mental Health Act also includes where it is suspected that a person suffers from a mental disorder. Beswick JA (as she then was) took a different view on the adequacy of the letters which came from the doctor concerning the diagnosis of the patient.

[15] Beswick JA (in her dissenting opinion), found that the two (2) letters from medical practitioners did not support a finding that Ms. Sonia Pottinger was a patient in that:

i. There was no verification of the authorship of the letters or acceptable certification/confirmation that these letters did in fact issue from medical doctors qualified to render an opinion about mental disorders.

ii. There was no evidence that the doctors understood that the letters were to be used in court proceedings and that they had a duty to help the court impartially (CPR rule 32.3(1)).

iii. Neither was there evidence as to the doctors' opinions as to whether the severity of any disease from which Ms. Sonia Pottinger may have been

suffering, was such as would classify her as a patient under the Mental Health Act.

iv. There was no evidence of the basis for the doctors' opinions as expressed in the letters.

[16] In analysing the judgment of Phillips JA, it is a fact that the CPR did not expressly require medical evidence in order for an application to be brought for a next friend. What the CPR required is that the person falls within the definition of patient under section 2 of the Mental Health Act and is incapable of managing his or her own affairs.

[17] Phillips JA was careful to state that for the purposes of litigation, the court should be in receipt of medical evidence. This court's understanding is also that there was in fact medical evidence in that case, which was presented in the form of two (2) letters purportedly prepared by two (2) medical doctors. The issue was more the adequacy of what was presented as opposed to suggesting that medical evidence was not required for the purposes of determining whether a person was a patient incapable of managing his or her own affairs.

[18] On the basis of the reasoning both in the majority and dissenting opinion, for the purposes of litigation, where it is asserted that an individual is a patient, medical evidence should be advanced.

Is there medical evidence in the case at bar?

[19] In this application, a very detailed medical report has been exhibited to the Affidavit of Mrs. HG. This Report has been prepared by Dr. Albert Chen, a registered medical practitioner in Jamaica and a Consultant Clinical Gerontologist. It is dated the 20th March, 2024 and is addressed to the Supreme Court.

[20] The Salient Features of the Medical Report have been summarized as follows; –

- *Mr. [VRS] was referred to him in the year 2019. He has examined Mr. [VRS] on three occasions, namely June 25, 2021, November 09, 2023, and March 7, 2024;*

- *From as far back as his first medical examination, he notes that in his opinion there was "profound impairment of Orientation, Attention, Recall and Calculation. There was also severe impairment of Executive Control Functions, Instrumental Activities of Daily Living (IADL) and Activities of Daily Living (ADL).*

- *He diagnosed Mr. [VRS] as having "Severe Vascular Cognitive Impairment resulting from Cerebral Small Vessel Disease (CSVD)". He describes this as a progressive degenerative disease of the brain which affects memory, thinking, language and general cognitive functions, and which at the time in 2019, may progress to dementia. He explained for the benefit of the Court that CSVD is the leading cause of cognitive impairment in Jamaica and is a progressive accumulation of small blockages of the arteries of the brain. Mr. [VRS], despite the prognosis refused treatment at this time.*

- *On November 09, 2023, he reviewed Mr. [VRS]. At this time, his condition had worsened and Mr. [VRS] was diagnosed with "Moderately-Severe Dementia". Mr. [VRS] accepted treatment and was placed on a course of medication which is aimed at slowing down the progressive disorder.*

[21] Based on the medical evidence which has been presented in this matter, the Court is satisfied on a balance of probabilities that Mr. VRS is a patient within the definition of section 2 of the Mental Health Act.

Whether there is sufficient medical evidence and otherwise that Mr. VRS is incapable by reason of a mental disorder of managing and administering his property and affairs?

[22] Having established that the individual is a patient, the Applicant must go further in meeting the requirements of section 29 of the Mental Health Act. In discussing section 29 of the Mental Health Act, it may be prudent to look at the history of the Mental Health Act and to also examine how such applications are treated in other jurisdictions where similar provisions are included within their statutory framework.

[23] The Mental Health Act of Jamaica came into effect on the 1st day of September 1999. It repealed and replaced the Mental Hospital Act and the Lunatics (Custody of and Management of their Estates) Act.

[24] It addresses several important aspects of the care of persons with mental illness. These include, but are not limited to, the admissions and treatment of patients, community health services and mental health review boards. Part VI of the legislation treats with the protection of the property belonging to patients. It is the court that must make determinations concerning the management of such property.

[25] Section 29 of the Mental Health Act is the primary statutory provision which governs applications concerning the management of the affairs of patients. Section 29, so far as is relevant, reads as follows.

> *"(1) The Supreme Court or a Resident Magistrate's Court (now Parish Court) in the case of property the value of which is within the monetary jurisdiction of that Court, may, on the application of the nearest relative or the Attorney General, exercise jurisdiction over the management of the property and affairs of a patient,* ***if the Court is satisfied by evidence (medical and otherwise) on affidavit that the patient is incapable by reason of mental disorder of managing and administering his property and affairs.***
>
> *(2) The Court, on an application being made to it under subsection (1), shall have the power to do all such things as appear to it to be necessary or expedient in the interest of and for the maintenance and benefit of the patient, and where it is deemed necessary also for a relative or dependent of the patient.*
>
> *(3) The Court may, in giving effect to its power under subsection (2), give directions or make orders in respect of –*
>
> > *(a) the transfer, vesting, sale, lease, rental or exchange of the patient's property;*
> > *(b) the acquisition of property in the name of or on behalf of the patient;*
> >
> > *(c) the settlement of property by way of gift;*
> >
> > *(d) the execution of a will on behalf of the patient;*
> >
> > *(e) the carrying on of the patient's business, trade or profession;*
> >
> > *(f) the sale, lease or rental of the patient's business or trade;*
> >
> > *(g) the dissolution of a partnership of which the patient is a partner;*
> >
> > *(h) the fulfilling of any of the patient's contractual obligations;*

> *(j) the payment of any debts incurred by the patient;*
>
> *(k) the exercise of any power of attorney vested in the patient;*
>
> *(l) all financial affairs of the patient…."*

[26] Interestingly, upon examination of what obtains in other jurisdictions, notably, the United Kingdom (UK) and Canada, it is palpably clear that the common thread that permeates all jurisdictions, is the statutory requirement for medical evidence.

[27] Part VII of the UK's Mental Health Act of 1983, is titled 'Management of Property and Affairs of Patients'. Sections 93 to 113 addresses several matters concerning patients. They include, but are not limited to, the exercise of the Judge's function regarding the patient as well as his/ her property affairs, together with the powers of the court in cases of emergency. Section 94(2) highlights that:

> *"The function of the Judge under this Part shall be exercised* ***where after considering medical evidence****; he is satisfied that a person is incapable, by reason of mental disorder of managing and administering his property and affairs, and a person as to whom the judge is so satisfied is referred to in this Part as a patient…"* **[Emphasis Added]**

[28] Unlike the Jamaican and UK Statute where there is no explicit reference to the number of medical practitioners that ought to provide medical evidence. The framers of the Canadian Statute, The Patient's Property Act, RSBS 1996, C 349, saw it prudent to entrench within that Statute, a requirement that Affidavits ought to be provided by two (2) medical practitioners. Section 3(1) of the Patients Property Act, RSBC 1996, C. 349 reads:

> *"If*
>
> *(a) on hearing an application, and*
>
> *(b) reading the* ***affidavits of two medical practitioners*** *setting out their opinion that the person who is the subject of the application is, because of*
>
> > *(i) mental infirmity arising from disease, age or otherwise, or*
> >
> > *(ii) disorder or disability of mind arising from the use of drugs,*
>
> *…*

> *Incapable of managing his or her affairs or incapable of managing himself or herself, or incapable of managing himself or herself or his or her affairs, it must, by order, declare the person*
>
> *(e) incapable of managing his or her affairs,*
>
> *(f) incapable of managing himself or herself,*
>
> *(g) or incapable of managing himself or herself or his or her affairs…"*

[Emphasis Added]

[29] In carefully assessing the approach under section 29 of the Mental Health Act of Jamaica as against other statutes with similar provisions, it can be concluded that these applications are determined primarily on medical evidence which means that such evidence must be cogent and prepared in a manner which secures the integrity of the process through which the management of a person's affairs may be determined by the court in these claims bearing in mind that they are usually undefended.

How Should the Medical Evidence be presented?

[30] Notwithstanding that it is clear that medical evidence is required under section 29(1) Mental Health Act, there is very little guidance concerning the nature of the evidence which must be advanced by the Applicant. Section 29(1) contains no guidance in this regard. What is clear is that there is no requirement within the statute that an expert in the field of psychiatry or gerontology should prepare a report of this nature. The effect of this legislative construct is that reports may very well be received from a general practitioner who has treated the person over a period of time and who is able to proffer an opinion. The weight to be attached to the evidentiary material is to be determined by the court.

[31] The lack of clarity in respect of the nature of medical evidence which is required where the Court is treating with a patient within the definition of the Mental Health Act has resulted in the divergent views expressed in the case of **Sharon Pottinger** (supra).

[32] What has also proved challenging for the Court is that the Mental Health Act predated the Civil Procedure Rules 2002, the former having come in to force on the 1st

September, 1999. How then do we reconcile Part 32 which deals with expert reports being admitted in a civil trial with section 29 Mental Health Act?

[33] It cannot be said that the overriding objective of dealing with cases justly is inapplicable to matters brought under the Mental Health Act. However, is there a requirement that the medical evidence presented must meet the standard of the CPR in its entirety? It is noted that there is no such requirement under the Mental Health Act.

[34] Additionally, Part 23 of the CPR which deals with minors and patients does not expressly require an expert report to be placed before the court for a determination to be made concerning whether a person is a patient. How do we strike the appropriate balance to ensure that the interest of the "patient" is protected whilst being careful not to import unnecessary requirements?

[35] A question for the court's consideration is whether the medical evidence which is presented must satisfy the CPR. In fact, Counsel in her written and oral submissions advanced that the medical evidence which is presented must satisfy the CPR. The court paid careful attention to these arguments and is of the view that notwithstanding its finding that the medical evidence is satisfactory, Counsel's arguments regarding the relationship between such medical reports and the CPR were worthy of exploration and analysis.

[36] The Court notes that the Mental Health Act predates the CPR and as such, its drafters could not have anticipated the provisions of the CPR. Fundamentally, the Court considers that the medical evidence presented must comply with the requirements of section 29 of the Mental Health Act. This evidence must enable the court to determine whether the individual qualifies as a "patient" under the Mental Health Act and is incapable of managing their affairs.

[37] Additionally, the Court acknowledges that Part 23 of the CPR, which governs matters involving patients and minors, does not stipulate that medical reports must adhere to the requirements outlined in Part 32 of the CPR for the Court to be satisfied that a person is a patient. Therefore, the Court is not inclined to incorporate the full

procedural requirements of Part 32 into the application of section 29 of the Mental Health Act. If this alignment were intended, the framers of the CPR could have explicitly included Part 32 within Part 23, which they did not do.

[38] Nevertheless, the question arises as to what constitutes adequate and appropriate medical evidence for applications under section 29 of the Mental Health Act and whether counsel's arguments advocating for adherence to the CPR are valid despite the absence of explicit guidance? To address this issue, the Court undertook a brief examination of how medical evidence is typically received and evaluated in judicial proceedings in this jurisdiction.

The Reception of Medical Evidence in our Courts in Jamaica

[39] In considering the question of how the medical evidence should be presented, and in the absence of any guidance within the Mental Health Act, it is important to consider the common law principles which govern the receipt of expert evidence generally in court proceedings, the CPR and any practice directions which guide in the receipt of such evidence.

[40] It is to be noted that the role and responsibility of a medical expert remains the same regardless of the nature of litigation being pursued. As such, commonalities will be found between elements of Part 32 of the CPR which covers the receipt of medical evidence for the purpose of civil litigation, and the rules which govern the receipt of medical evidence in criminal cases.

[41] At common law, the principles governing the receipt of expert evidence in civil trials, generally, are to be found in the judgment of Cresswell J in the case of **Ikerian Reefer** [1993] 2 Lloyds Rep. 68. It must be noted that **Ikerian Reefer** surrounded a highly contentious litigation following a fire which destroyed a ship known as the Ikerian Reefer. Several expert witnesses were called by both sides and Cresswell J expressly indicated that there was the need to manage the number of experts being called by the parties to effectively utilise judicial time. He also expressed concerns that several experts demonstrated a lack of understanding of their role in the litigation process. This

prompted him to outline the role and responsibilities of expert witnesses. At p. 81 of the decision, Cresswell J stated as follows;

> *" B. THE DUTIES AND RESPONSIBILITIES OF EXPERT WITNESSES*
>
> *The duties and responsibilities of expert witnesses in civil cases include the following:*
>
> *1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (Whitehouse v Jordan, [1981] 1 WLR 246 at p 256, per Lord Wilberforce).*
>
> *2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (see Polivitte Ltd v Commercial Union Assurance Co Plc, [1987] 1 Lloyd's Rep 379 at p 386 per Mr Justice Garland and Re J, [1990] FCR 193 per Mr Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.*
>
> *3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (Re J sup).*
>
> *4. An expert witness should make it clear when a particular question or issue falls outside his expertise.*
>
> *5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (Re J sup). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report (Derby & Co Ltd and Others v Weldon and Others, The Times, Nov 9, 1990 per Lord Justice Staughton).*
>
> *6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.*
>
> *7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the party at the same time as the exchange of reports (see 15.5 of the Guide to Commercial Court Practice)."*

[42] Cresswell J's pronouncements on the role and responsibilities of expert witnesses were followed in criminal cases such as **R v Bowman** [2006] EWCA Crim 417. In the latter, the court also added the following;

> *1. Details of the expert's academic and professional qualifications, experience and accreditation relevant to the opinions expressed in the report and the range and extent of the expertise and any limitations upon the expertise.*
>
> *2. A statement setting out the substance of all the instructions received (whether oral or written), questions upon which an opinion is sought, the materials provided and considered, and the documents, statements, evidence, information or assumptions which are material to the opinions expressed or upon which the opinions are based.*
>
> *3. Information relating to who has carried out measurements, examinations, tests etc and the methodology used, and whether or not such measurements etc. were carried out under the expert's supervision.*
>
> *4. Where there is a range of opinion in the matters dealt with in the report a summary of the range of opinion and the reasons for the opinion given. In this connection any material facts or matters which detract from the expert's opinions and any points which should fairly be made.*
>
> *5. Relevant extracts or literature or any other material which might assist the court.*
>
> *6. A statement to the effect that the expert had complied with his/her duty to the court to provide independent assistance by way of objective unbiased opinion in relation to matters within his or her expertise.*

[43] These six additional features outlined in **R v Bowman** (a criminal trial) are synonymous with Rule 32.13 of the CPR.

[44] The rules governing the receipt of expert evidence in civil trials is governed by Part 32 of the CPR. In examining the provisions therein, it is observed that Rule 32.3 (Expert witnesses overriding duty to Court) and 32.4 (Way in which expert witness's duty is to be carried out) reflects the principles of Cresswell J in **Ikerian Reefer.**

[45] In considering the fact that these duties reflect the common law position as regards civil trials as well as criminal trials, they would be applicable to the receipt of medical evidence for the purposes of applications brought under section 29 of the Mental Health Act. The role and responsibilities of the expert transcend the nature of

litigation and are applicable to both the criminal and civil arena as exemplified in the case of **R v Bowman**.

[46] The court is further fortified in its view as on a close examination of the additional criteria included in **R v Bowman** and which have been reproduced in the Supreme Court Criminal Bench Book at p. 128, paragraph 18, it is evident that the Court in **R v Bowman** sought to include the salient features of Rule 32.13 within the framework of the receipt of expert evidence in criminal trials.

[47] The effect of this is that in both civil and criminal trials, the common law principles are equally applicable. When it comes to the receipt of expert evidence and specifically as it regards their role and responsibilities, there is no room for the proverbial "apples and oranges" debate. Different rules do not apply because of the arena in which the evidence is being advanced.

[48] For the purpose of the case at bar, the receipt of expert evidence in the form of medical evidence is our primary focus. Having established that the principles are applicable in both the criminal and civil arena where expert evidence is received, it is important to examine a recent practice direction which has been issued by the Honourable Chief Justice of Jamaica as it concerns standardizing the form in which medical reports are received in a criminal trial.

[49] On examining Practice Direction 1 of 2023, Form of Medical Report for use in criminal matters in the Courts of Jamaica, it is evident that the contents of the Report as outlined in the practice direction is consistent with Rules 32.3, 32.4 and the salient features of 32.13 as outlined in **R v Bowman**.

[50] The significance of this Practice Direction is that it is a direct response to the introduction of section 31CB of the Evidence Amendment Act which allows for the receipt of expert reports without the maker of the report being called to give evidence. Section 31CB offers no guidance in respect to the contents of those reports. A similar position obtains in respect of section 29 of the Mental Health Act.

[51] In the absence of guidance within the statute and further in analysing the common law, together with the Civil Procedure Rules as well as the Practice Direction 1 of 2023, the following principles, once followed will result in consistency in approach to medical evidence as well as serve to safeguard the overriding objective of dealing with cases justly as well as to protect patients who are the subject of these largely undefended claims which are brought under section 29 of the Mental Health Act:

- In applications under section 29 of the Mental Health Act, medical evidence may be presented in the form of an Affidavit prepared by a medical practitioner or in the form of a report prepared by the practitioner which is then exhibited to an affidavit as is the customary practise or both;

- Where the medical evidence is solely contained in a medical report which is then attached to an Affidavit of another person, this report should be addressed directly to the Registrar of the Supreme Court or to the Clerk of the Court for the Parish Court before which the matter is being heard;

- The name and qualifications of the medical practitioner should be included. It should be established whether the medical practitioner is registered in Jamaica or elsewhere (where applicable) and include their registration number;

- The report should include where applicable, whether there is any special area of speciality and any special designation, such as General Practitioner/Consultant;

- The report should state the name, age and D.O.B of the patient being examined the date of the examination and a brief history of the patient, together with a statement of findings and diagnosis (if any);

- The medical report should expressly indicate whether it is the opinion of the medical practitioner that the patient is a patient for the purposes of the Mental Health Act who is incapable of managing his/ her affairs;

- Lastly, it is best practise and in keeping with the common law principles that the medical practitioner should expressly state that he understands his duty to the Court to assist the court impartially and that he has complied with that duty.

[52] In addition to the requirements discussed above, the Court has carefully assessed the decision in three (3) cases which touch and concern the adequacy of medical reports in matters of this nature. It should be noted that counsel in her submissions invited the Court to consider the cases of **Sharon Pottinger** (discussed above) and **Gloria Henry v Grace Style and Others** [2020] JMSC Civ 165 ("**Gloria Henry**"). The court also considered the case of **In the matter of the Estate of Dudley Ian Ward Horner** (unreported), Claim No. 2007HCV04699, Supreme Court of Jamaica (delivered 12th August, 2009).

[53] In the case of **Gloria Henry**, the claim before the Supreme Court involved a boundary dispute between the Claimant and the Defendants. The parties resolved the dispute by entering a Consent Order, after which the claim proceeded to assessment of damages and the Claimant was awarded 1.9 Million Dollars, including the value of the land, valuator fees and a portion of the cost of erecting a boundary wall, and costs. The 1st Defendant failed to comply with the Court's Order and the Claimant obtained an Order for Seizure and Sale to enforce the judgment. The 1st Defendant, at first, filed an application to set aside the Consent Order, among other reliefs, but later amended it to include an Order to appoint a Next Friend for the applicant, who was said to be a patient, pursuant to section 2 of the Mental Health Act and Part 23 of the CPR.

[54] The quality of the evidence that was presented to the court in support of the application was reviewed by Wolfe-Reece, J. The learned Judge, in relying on the **Sharon Pottinger** decision, held that the two (2) letters from medical doctors were not expert reports within the meaning of Part 32 of the CPR. In assessing what weight to place on the two (2) letters, the learned Judge found that the letters were vague, the diagnosis included a range of illnesses of which dementia was one, and the court was left to assume the date of the onset of dementia and the severity of the condition. The

court held that there was no sufficient evidence to convince the court that the 1st Defendant was a patient. The application to set aside consent order was dismissed.

[55] The matter of **Sharon Pottinger**, along with its dissenting judgment and **Gloria Henry**, serves to highlight the concerns which a court may have where the medical evidence may be considered to be vague.

[56] Brooks J (as he then was) also voiced concerns in **Estate of Dudley Ian Ward Horner** in terms of the quality of evidence being presented in cases of this nature. In that case, the Court was concerned with an application brought by Mr. Horner. Mr. Horner sought to set aside an order made under section 29 of the Mental Health Act in which the Court ruled, in an undefended application, that he was a patient and made orders regarding the management of his affairs. Mr. Horner sought to challenge the decision on the basis that he was not served with the application and was fit and proper to manage his affairs. In the context of that matter and the circumstances surrounding the case, Brooks J (as he then was) sought to issue a general caution in matters of this nature. He stated as follows:

> *"This case raises important questions regarding the integrity of the procedure regarding applications to declare persons incapable of managing their affairs. As it presently exists, the procedure has great potential for abuse. A perfectly capable individual could well find himself a prisoner in his own home on the basis of a Court Order where the court is relying only on the account of an applicant who wishes to have control of that individual's property, possibly for nefarious purposes. The Court traditionally relies heavily on the integrity and professionalism of the medical evidence in making its decision concerning the relevant order. In many cases the reputation of the doctor is well known and the court is comfortable accepting the opinion rendered. There may be cases however where the reputation of the doctor is not previously well known to the Court. It is my view that more transparency is required.*
>
> *The potential for injustice which I have identified may be addressed by a number of methods but perhaps most easily by a practise direction which requires a social inquiry report from some independent agency as to the circumstances of the patient. A hearing in open court, rather than in chambers, may also provide some protection against an order being made without complete disclosure having been made to the Court…"*

[57] To sum up the preceding discussion, the Mental Health Act provides little guidance on the nature of the medical evidence required to determine whether an individual qualifies as a "patient" under section 29(1). While it is clear that medical evidence is necessary, the statute does not stipulate that such evidence must come from a specialist in psychiatry or gerontology. This legislative silence means that reports prepared by general practitioners who have treated the individual may suffice. However, the court retains discretion to determine the weight to be attached to such evidence.

[58] The CPR, which postdate the Mental Health Act, do not impose any additional evidentiary requirements on applications under section 29. Although Part 32 of the CPR outlines procedural requirements for expert reports in civil trials, there is no mandate for strict compliance with these rules in cases under the Mental Health Act. Further, Part 23 of the CPR, which governs matters involving minors and patients, does not expressly require expert reports to meet the standards of Part 32. Therefore, the court is not inclined to incorporate the full procedural requirements of Part 32 into the application of section 29 of the Mental Health Act.

[59] The principles governing expert evidence, as established in **Ikerian Reefer** and **R v Bowman**, provide a helpful framework for evaluating medical reports. These principles emphasize the independence, objectivity, and thoroughness required of expert witnesses. Notably, the Practice Direction 1 of 2023, issued by the Honourable Chief Justice of Jamaica, aligns with these principles by standardizing the format of medical reports in criminal matters. This practice direction can serve as a useful guide for applications under section 29 of the Mental Health Act, ensuring consistency in the receipt and evaluation of medical evidence.

[60] Case law has highlighted the challenges posed by inadequate medical evidence in matters under the Mental Health Act. In **Sharon Pottinger** and **Gloria Henry**, the court expressed concerns over vague and insufficient medical reports that failed to provide the clarity and specificity necessary for a fair determination. Similarly, Brooks J, in **Estate of Dudley Ian Ward Horner**, warned of the potential for abuse in applications under section 29 of the Mental Health Act. He stressed the importance of procedural

safeguards to protect individuals from unjust outcomes, particularly where applications are undefended.

[61] To address these concerns and promote consistency in judicial practice, the Court adopts the following principles for medical evidence in applications under section 29 of the Mental Health Act:

a) Medical evidence may be presented in affidavit form by a medical practitioner or as a report exhibited to an affidavit.

b) Reports should be addressed directly to the Registrar of the Supreme Court or the Clerk of the Court for the Parish Court hearing the matter.

c) Reports must include the name, qualifications, and registration details of the medical practitioner, as well as any specializations.

d) Reports should provide the patient's name, age, date of birth, date of examination, a brief medical history, findings, and diagnosis.

e) Reports must expressly state whether, in the practitioner's opinion, the individual qualifies as a "patient" under the Mental Health Act and is incapable of managing their affairs.

f) Practitioners must affirm their duty to assist the court impartially and state that they have complied with this duty.

[62] In light of the potential for abuse in these proceedings, the court also notes Brooks J's recommendation in **Estate of Dudley Ian Ward Horner** that additional safeguards be considered, such as requiring a social inquiry report or conducting hearings in open court. These measures would enhance transparency and reduce the risk of unjust outcomes.

[63] By adhering to these principles, the court seeks to ensure that applications under section 29 of the Mental Health Act are determined on the basis of robust, clear, and

impartial evidence, safeguarding the interests of vulnerable individuals while upholding the integrity of the judicial process.

[64] In view of this, the court has examined the evidence of Dr. Chen in the case at bar accordingly. Dr. Chen included the following in his medical report;

> *"Mr. [VRS] is not capable of living alone and independently, without risk to himself, and he needs help with both his Instrumental Activities of Daily living and his basic activities of Daily living.* ***He has lost the cognitive capacity to make important business and other decisions in his own best interest, and should have pertinent, trustworthy and reliable support from family and significant others.***
>
> ***I strongly recommend that Mr. [VRS] no longer signs legal documents nor enter-into contracts by himself any by his own volition, without family support and supervision****…"*

[65] In the case at bar, the court finds that the Medical Report which has been prepared by Dr. Chen includes the necessary information which is capable of assisting this Court in the determination to be made. Further, that it can be accepted and is sufficient to satisfy this Court to the requisite standard that Mr. VRS is a patient under the Mental Health Act who is incapable of managing his affairs.

The Consideration of the Other Evidence

[66] In this matter, the court has also considered the Affidavits of Mrs. HG, Mrs. PVS and Ms. Nicola Christopher (Practical Nurse). In respect of Mrs. HG, her evidence is that she has observed that her father's condition has deteriorated over time, and she exhibits the medical report of Dr. Chen.

[67] In respect of Ms. Nicola Christopher's affidavit, she deponed that she is a practical nurse who works with Mr. VRS. She speaks of both her interactions with the Claimants and Mr. VRS. She states that she assists Mrs. PVS with the care of Mr. VRS. She gives him his medication, checks his vitals and assists with his grooming. She also spoke of her observations regarding Mr. VRS' forgetfulness and indicates that she has worked with patients who suffer from Dementia and Alzheimer's disease prior to working with Mr. VRS.

[68] Having considered the other evidence, in conjunction with the medical evidence, the court is fortified in its view that Mr. VRS is a patient who is incapable of managing his affairs.

Whether Mrs. PVS and/or Mrs. HG are the nearest relatives for the purposes of section 3 of the Mental Health Act?

[69] Section 29 (1) of the Mental Health Act states this this application may be brought by a "nearest relative" of the patient or the Attorney General. Section 3(1) defines relative as including the husband or wife as also a son or a daughter of the patient. The order of the "nearest relative" is as follows;

> *(a) Husband or wife*
> *(b) Son or daughter*
> *(c) Father*
> *(d) Mother*
> *(e) Brother or sister*
> *(f) Grandparent*
> *(g) Grandchild*
> *(h) Uncle or Aunt*
> *(i) Nephew or niece*

[70] Section 3(3) goes on to guide us in terms of who is to be considered the nearest relative amongst these categories of persons. It states as follows;

> *"Subject to the provisions of this section, in this Act, the "nearest relative" means a husband or wife, or if there is no husband or wife, any of the persons mentioned in subsection (1) (b) to (l) in order of precedence who is for the time being surviving, relatives of the whole blood being preferred to relatives of the same description of the half blood."*

[71] In this application, two (2) parties have approached the court. Both parties have placed evidence before the court of their relationship to the patient. Mrs. HG provided her Birth Certificate which supports a finding of her relationship to the Mr. VRS and Mrs. PVS, as their daughter. This Birth Certificate also supports a finding that Mr. VRS and Mrs. PVS are related. Nonetheless, Mrs. PVS provided her Marriage Certificate as proof of her relationship to Mr. VRS.

[72] By virtue of the familial relationship that the Claimants have with Mr. VRS, both would qualify to be made a committee. The court recognizes the order of priority, and is cognizant that Mrs. PVS would have priority. However, the court takes notice of the age of Mrs. PVS and appreciates that it may be more prudent to allow her daughter Mrs. HG to also manage Mr. VRS' affairs out of an abundance of caution. There is nothing in the legislation which prevents this. Further, the court reminds itself, that this was a joint application by both Claimants.

[73] The oral submissions of Counsel support the court's view and finding in this regard. The court observed Mrs. PVS, who was present on both occasions when this matter was heard, to be very vibrant and even answered questions which were posed during the deliberations.

[74] Nonetheless, the court is not of the view that Mrs. PVS alone could care for Mr. VRS. Additionally, the court takes note of the fact that Mrs. HG does not live with her parents and has other obligations. It is on that basis that the court was pointed to the evidence of Ms. Nicola Christopher as to her capabilities to assist in the day to day care of Mr. VRS. The court accepts this evidence and is of the view that it will greatly assist both Claimants in dealing with the day-to-day care of Mr. VRS.

CONCLUSION

[75] This court is satisfied to the required standard that Mr. VRS is a patient within the meaning of section 2 of the Mental Health Act. The court also accepts that the Claimants are the nearest relatives of Mr. VRS, and are fit and proper persons to be appointed to manage his property and affairs.

[76] It is important in applications like these, that the court is provided, where possible, with independent evidentiary material surrounding the circumstances of the patient. The court accepts that the medical evidence is presented as an independent document. However, the peculiar circumstances of cases of this nature is that where these matters are undefended, the expert is usually commissioned by the party bringing the application. To safeguard the interests of the patient, who is not served with the

application, every care should be taken to ensure that such a powerful order is not placed in the hands of nefarious individuals in pursuit of an improper motive. This court received the Affidavit of Ms. Christopher as a somewhat independent account outside of the Claimants, though accepting that she herself is a paid employee of the Claimants. Nonetheless, the court feels sure in the position it has taken in this matter.

ORDERS

[77] In view of the foregoing, the Orders of the Court are as follows.

1. Mr. VRS is a patient within the meaning of section 2 of the Mental Health Act.

2. The Claimants, being the wife and daughter, respectively of Mr. VRS are two of his nearest relatives within the meaning of section 3 of the Mental Health Act.

3. The Claimants are authorized, jointly and/or severally, to do all such things as appear to be necessary or expedient in accordance with section 29(3) of the Mental Health Act in the interest of and for the maintenance and benefit of Mr. VRS, namely:

    i. The transfer, vesting, sale, lease, rental or exchange of the patient's property;

    ii. The acquisition of property in the name of or on behalf of the patient;

    iii. The fulfilling of any of the patient's contractual obligations

    iv. Payment of any debts incurred by the patient;

    v. The continuance or institution of any legal proceedings on behalf of the patient;

vi. The exercise of any power of attorney vested in the patient;

vii. All financial affairs of the patient

4. The Claimants to give an account in relation to their dealings with the financial affairs of the patient annually commencing December 07, 2025 by filing a report in the Registry of the Family Division of the Supreme Court;

5. The Claimants' Attorney to prepare, file and serve this Order.

Sgd. A. Martin-Swaby
Puisne Judge (ag)