



[2023] JMSC Civ. 146

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2015HCV05928**

<b>BETWEEN</b>	<b>CASILDA SILVEST</b>	<b>CLAIMANT / RESPONDENT</b>
<b>AND</b>	<b>LEO BROWN</b>	<b>DEFENDANT / APPLICANT</b>

**IN CHAMBERS**

Mr Lemar Neale instructed by Nea|Lex for the Applicant

Mr Ronald Paris instructed by Paris and Company for the Respondent

Heard: May 2, 2023 and May 18, 2023

***Expert evidence - Doctor appointed expert witness - Impartiality of expert witness  
- Admissibility of medical reports - Whether comments made by doctor in medical  
reports render the reports inadmissible - Part 32 Civil Procedure Rules 2002***

**Sarah Thompson-James J.**

**Introduction**

**[1]** The Applicant by way of Notice of Application for Court Orders filed May 1, 2023 sought the following orders:

- (i) That Professor, Dr Renn Holness be disqualified as an expert witness in the matter.
- (ii) In the event, permission be granted to the applicant to call on Dr Randolph E. Cheeks as expert witness at the trial of the matter.

- (iii) Permission be granted to put Dr Randolph E. Cheeks' expert report dated September 8, 2016, into evidence.
- (iv) Costs of this application to be costs in the claim.
- (v) Such further and other relief as this Honourable Court deems just.

The applicant grounds his application on rules 1.1, 32.4(1) and (2). 32.6 of the CPR.

## **Background**

- [2] On November 7, 2022, when the matter came on for trial, the Defendant's Attorney-at-law, Mr Lemar Neale made an oral application challenging the admissibility of the expert evidence of Professor Dr Renn Holness contained in two reports dated January 19, 2017 and April 21, 2017 on the basis that the expert was not independent and impartial. The trial was adjourned and the challenge to the admissibility of the expert evidence was set to be heard in Chambers. The matter came on for hearing on May 2, 2023.
- [3] Counsel directed the court to the statements contained in Professor Dr Holness' expert report dated January 19, 2017 and repeated in his report dated April 21, 2017 that he attributed to the expert's lack of independence and impartiality. The statements are as follows "*All of the above does not take into consideration this lady's age and the evidence of further deterioration in her cervical spine on repeat MRI. Four years have elapsed since the accident and she is now 74 years old with no real prospect of further improvement. It is clearly time to settle this claim if she is to derive any benefit at all. I urge Ms Silvest's council(sic) and the insurance company to negotiate this as soon as possible.*"

## **Issue**

- [4] The issue for the court's determination is whether Professor Dr Renn Holness' expert reports dated January 19, 2017 and April 21, 2017 should be admitted into

evidence despite the contention that statements made in his reports show that he is not independent and impartial.

### **Applicant's submissions**

- [5] Counsel for the applicant, relied on Civil Procedure Rules (CPR) 32.4 (1) and (2) in support of his submissions that Professor Dr Holness has not shown that he is independent or impartial. He argued that a reasonable person having an appreciation of the facts would readily assume that Professor Dr Holness is influenced by the litigation and he desires a particular outcome. Dr Holness wants the claimant to receive a benefit and is urging the insurance and the claimant's lawyers to settle the claim. Counsel added that these are matters not appropriate for a medical expert in a personal injury trial to comment on.
- [6] It was counsel's further submission that the report might have been fashioned or exaggerated to ensure that the claimant derives a benefit. He stated that this can be seen with the impairment rating which is challenged by Dr Cheeks.
- [7] Mr Neale argued, relying on **Kennedy v Cordia (Services) LLP** [2016] UKSC 6, that the lack of impartiality is not a matter that goes to weight, but to the root of admissibility. He submitted that the statements of Professor Dr Holness show that he is predisposed to being favourable to the claimant and it is not simply for the court to redact the statements or have the doctor resubmit a report removing the offending portions. He is already shown to be influenced by the demands of the litigation and is not independent nor objective. The doctor has displayed bias in favour of the claimant owing to her condition that he seeks to exaggerate, for no other reason but to evoke sympathy for her. He has already shown his hands and this will not change.

## **Respondent's Submissions**

- [8] Mr Ronald Paris in his written response contended that Professor Dr Holness' comment does not show that he was partial but shows that he was expressing his expert opinion on the effect of the claimant's advanced age on her prospects of further improvement which was within his competence. He relied on **S(VJ)** [2006] EWCA Crim 2389 where an expert on autism was permitted to give evidence that a person of the complainant's age with autistic condition would find it difficult to create and maintain a false allegation.
- [9] In his oral submissions, counsel argued that the statements being challenged by the applicant are statements of facts and the applicant has not shown how the statements have breached the rules. He stated further that these statements have nothing to do with the actual medical condition of the claimant. Further that the comments contained in the sentences has nothing to do with the expert's expertise. He argued that Professor Dr Holness is not in the statements providing independent assistance or tendering any medical evidence. He stated that it is only if he is biased in rendering any opinion on matters in his expertise then he is biased. Further, he argued that counsel is not challenging the medical evidence, and counsel has pointed to nothing in the medical reports to show that the expert is biased or influenced by demands of the litigation. He argued that the law does not say that the expert cannot offer his opinion on a none expert area.

## **Law**

- [10] The Civil Procedure Rules prescribe at rule 32.4 the way in which expert witness's duty to the court is to be carried out. CPR 32.4(1) and (2) which are relied on provide that:

*(1) 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*

*(2) 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.*

[11] In **Kennedy v Cordia (Services) LLP** [2016] UKSC 6, Lord Reed and Lord Hodge (who delivered a joint judgment with which the other judges agreed) at paragraph 51 stated:

*“If a party proffers an expert report which on its face does not comply with the recognised duties of a skilled witness to be independent and impartial, the court may exclude the evidence as inadmissible: Toth v Jarman [2006] EWCA Civ 1028; [2006] 4 All ER 1276, paras 100-102. In Field v Leeds City Council [2000] 1 EGLR 54, the Court of Appeal upheld the decision of a district judge, who, having ordered the Council to provide an independent surveyor's report, excluded at an interim hearing the evidence of a surveyor whom the Council proposed to lead in evidence on the ground that his impartiality had not been demonstrated. It is unlikely that the court could make such a prior ruling on admissibility in those Scottish procedures in which there is as yet no judicial case management. But the requirement of independence and impartiality is in our view one of admissibility rather than merely the weight of the evidence.*

[12] In **Louise Allen and another v Rowan Mullings** [2013] JMCA App 22 Phillips JA with whom the other members of the panel agreed, confirmed that in Jamaica the independence and impartiality of the expert is a question central to admissibility of the expert evidence. She stated at paragraph 46:

*“...There is no doubt that the expectation is that the expert should provide independent and impartial assistance to the court within his expertise, and it is that objectivity and expertise that the court should use as its test for the admissibility of expert evidence. The questions are: does the witness have the expertise and is the witness aware of his primary duty to the court if he gives expert evidence? It has been held that the apparent bias test applicable to a court or tribunal, referred to by the trial judge, is not the correct test in deciding whether the evidence of the expert should be excluded, but the test is as stated above (see Regina (Factortame Ltd and Others) v Secretary of State for Transport, Local Government and the Regions (No 8) [2003] QB 381). What*

*must be recognised always, as stated by Harris JA in this court in Cherry Dixon-Hall v Jamaica Grande Limited, SCCA No 26/2007 delivered 21 November 2008, is that the role of the expert is to assist the trial judge, and he must put before the court all the material necessary for testing the accuracy of his findings and conclusions. It is also trite law that the findings of the expert are never binding on the judge and he can accept or reject the expert's opinion."*

- [13] In **Helical Bar and another v Armchair Passenger Transport Limited** [2003] All ER (D) 436 (Feb) Queens Bench Division, the defendant's bus collided with the first claimant's car when it was being driven by the second claimant. The first claimant hired a substitute vehicle from S Ltd. The first claimant brought proceedings in which it claimed, inter alia, the hire charges. The second claimant claimed damages for personal injury. The defendant denied negligence and challenged the claim for car hire. The defendant sought permission to rely upon an expert report of M on the basis that the report would provide factual comparable hire rates for consideration by the court. M was a market researcher and consultant who specialised in surveys of the self-drive hire market, selling such surveys to spot hire companies. He had given evidence for both claimants and defendants in credit hire litigation. The judge gave the defendant permission to rely on the report. The claimants applied successfully for the order to be set aside relying on the fact that M had previously been employed by S Ltd so that his evidence was not independent. The judge was of the opinion that it was not right that someone with a connection, even a past connection to a party should give evidence as an expert and that justice would not be seen to be done if M was appointed. The defendant appealed submitting that the judge had applied too stringent a test.
- [14] In determining the appeal, Nelson J relied on *Fields v Leeds City Council* [2000] 1 EGLR 54 and *Factortame Ltd and others v Secretary of State for the Environment, Transport and the Regions (No.2)* [2002] 4 All ER 97. He allowed the appeal and ordered that the reports be submitted into evidence. In support of his decision he set out the following principles at paragraph 29 of his judgment.

*i) It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings.*

*ii) The existence of such an interest, whether as an employee of one of the parties or otherwise, does not automatically render the evidence of the proposed expert inadmissible. It is the nature and extent of the interest or connection which matters, not the mere fact of the interest or connection.*

*iii) Where the expert has an interest of one kind or another in the outcome of the case, the question of whether he should be permitted to give evidence should be determined as soon as possible in the course of case management.*

*iv) The decision as to whether an expert should be permitted to give evidence in such circumstances is a matter of fact and degree. The test of apparent bias is not relevant to the question of whether or not an expert witness should be permitted to give evidence.*

*v) The questions which have to be determined are whether (i) the person has relevant expertise and (ii) he or she is aware of their primary duty to the Court if they give expert evidence, and willing and able, despite the interest or connection with the litigation or a party thereto, to carry out that duty.*

*vi) The Judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules.*

*vii) If the expert has an interest which is not sufficient to preclude him from giving evidence the interest may nevertheless affect the weight of his evidence.*

**[15]** In **Khouly Construction & Engineering Limited v Edmond Mansoor** ANUHCVP2020/0023 Eastern Caribbean Court in the Court of Appeal, the claimant agreed to construct the defendant's property within a scheduled time and for a fixed price. However, several variations were made to the contract which resulted in an increase in the cost of construction. The defendant terminated the contract. The claimant claimed damages for breach of the building contract. The defendant counterclaimed for breach of contract on the basis of poor workmanship. During the course of the trial, the court relied on several expert reports to determine the issue of liability. The trial judge granted damages in favour of the claimant in

the claim and to the defendant on the counterclaim. The claimant appealed against the judgment in favour of the defendant on the counterclaim. One of the issues before the court was whether the learned judge erred in relying on or attaching weight or too much weight to the expert report of Mr Hugh Schamber (the Schamber report) in coming to her decision on the counterclaim.

- [16] The appellant argued inter alia, that Mr Schamber was not an independent expert as required by rule 32.4 of the (Eastern Caribbean Court) CPR, additionally, that Mr Schamber made recommendations as an expert which would have resulted in business for the company of which he was a director. The appellants took issue with a statement by Mr Schamber that he had been engaged by the respondent to *'undertake a condition survey... to assess the extent of the reported roofing problems'* at the respondent's residence and to *'submit appropriate remedial recommendations'* and that *'we appreciate the opportunity to be of assistance on this project and hold ourselves available to be of any kind of further assistance required'*. The appellants also took issue with the fact that Mr Schamber's report was on his company's letterhead. Farara JA (Ag) addressed the contentions as follows:

*"It is a fundamental principle that whether expert evidence is to be accepted is a question of fact for the trial judge. A critical aspect of the credibility of the expert and hence the weight to be attached to his opinions and conclusions, is whether they are explained and reasoned. Mere assertions or 'bare ipse dixit' carries little weight. An expert's evidence must be considered by the trial judge together with all the other evidence before the court which the judge has accepted. **A challenge to a trial judge's decision to admit and to rely on expert evidence must be assessed being mindful that decisions as to the admissibility of expert evidence and the weight to be attached to that evidence, are fact-sensitive matters involving an evaluative exercise on the part of the trial judge.** In this case, the appellant's criticisms of the respondent's expert witness, Mr. Schamber, falls short of satisfying the threshold for warranting appellate interference with the trial judge's decision. It cannot be said that the statement in the Schamber report as to his company's willingness to be of further assistance, if requested, or any other statement in the said report, crossed the line so as to lead to Mr. Schamber not being an independent expert capable of giving an unbiased or independent opinion to the court, or that he was in some way tainted as an expert witness as to the*



*matters contained or addressed in his report, which matters all related to roofing issues. Further, it is wholly unsustainable to ground any objection to the admissibility of the Schamber report on the fact that the said report was rendered on the letterhead of his firm or organisation. If this was a disqualifying factor in this matter or if this, by itself, pointed conclusively to a lack of independence, then all the experts whose reports were admitted into evidence by the lower court would be likewise tainted. It was therefore open to the judge, and she was correct, not to reject the Schamber report purely on the basis of the opinions or conclusions which he reached not being those of an independent and unbiased witness.”*

## **Analysis**

[17] Base on CPR 32.3, the duty of the expert witness is to assist the court impartially on matters relevant to his expertise. This duty overrides any obligation the expert may have to the person by whom he or she is paid. An expert witness should therefore be independent and impartial. This means that the expert should have no interest in the outcome of the litigation. The question of whether an expert witness is independent and impartial is a question for the court’s consideration when deciding whether to admit into evidence an expert report. In determining this question, the court should have regard to whether the expert witness has any apparent or actual interest in the outcome of the proceedings. However, the existence of an interest in the outcome of the litigation does not automatically, render the expert report inadmissible. If the expert witness has any actual or apparent interest in the outcome of the litigation, the court should examine the nature and the extent of the interest. In doing, so the court should consider (i) whether the person has the relevant expertise and (ii) whether he or she is aware of their primary duty to the court and is willing and able to carry out that duty notwithstanding their interest. The court should also consider the alternative choices open if the expert is excluded from giving evidence. These are the principles distilled in **Helical Bar and another v Armchair Passenger Transport Limited** [2003] All ER (D) 436).

- [18] An assessment of the report dated January 19, 2017, shows that Professor Dr Holness responded to a letter from Mr Paris requesting his comments on Dr Cheeks' review of his previous medical report. Professor Dr Holness at paragraphs A and B of the report made clarifications to statements made by Dr Cheeks in his review and highlighted areas in his reviewed report which supported the clarifications made. At paragraph C, he agreed with Dr Cheeks' analysis of the claimant's left hand function using a comparison between the 5<sup>th</sup> and 6<sup>th</sup> editions of the "*AMA Guidelines to the Evaluation of Permanent Impairment*". Dr Holness then went on to indicate his reason for giving an assessment of 30% of the total person. He then concluded "*All of the above does not take into consideration this lady's age and the evidence of further deterioration in her cervical spine on repeat MRI. Four years have elapsed since the accident and she is now 74 years old with no real prospect of further improvement. It is clearly time to settle this claim if she is to derive any benefit at all. I urge Ms Silvest's council(sic) and the insurance company to negotiate this as soon as possible.*"
- [19] In his report dated April 21, 2017, Professor Dr Holness indicated that he was providing a more accurate assessment of the claimant as regards her current level of functioning four years after the accident. His report showed that he examined the patient eight (8) days before he prepared the report. His report outlined his findings following his assessment. He then repeated his conclusions outlined above.
- [20] Counsel for the applicant has argued that a reasonable person having an appreciation of the facts would readily assume that Professor Dr Holness is influenced by the litigation. However, the authorities show that *the test of apparent bias is not relevant to the question of whether or not an expert witness should be*

*permitted to give evidence.*<sup>1</sup> Accordingly, it is not open to the court in this case to refuse to admit expert evidence on the basis that a reasonable observer might conclude that the expert has an interest in the outcome of the litigation on the sole basis of the words used by the expert in his conclusion. I am of the view that more material would be required to show the expert's interest and that it would affect the impartiality of his evidence.

[21] Mr. Neale also submitted that the expert has shown that he is predisposed to being unduly favourable to the claimant. That he is already shown to be influenced by the demands of the litigation and that he has displayed a bias in favour of the claimant by seeking to exaggerate her condition to evoke sympathy for her. He directed the court to the impairment rating which Dr Cheeks challenged to support his position. Professor Dr Holness has however provided his reasons for his impairment rating of the claimant and he based his reasons on the injuries received. He also showed why his total permanent partial disability (PPD) rating of the claimant differed from the that attributed by Dr Cheeks. In the circumstances, in my view, Mr. Neale has not shown that the expert is incapable of providing impartial evidence to assist the court in its determination of the issues in the claim.

[22] The claimant claims that she sustained a fractured 2<sup>nd</sup> cervical vertebrae with an injury of her spinal cord with significant residual neurological impairment due to a collision caused by the defendant. If the court finds that the defendant is liable for the accident, it also has to determine whether the injuries sustained by the claimant was as a result of the accident and if so the quantum of damages to be awarded. Professor Dr Holness is a consultant neurosurgeon at the Cornwall Regional Hospital since 2010 and has over 40 years' experience as a neurosurgeon. He is also a professor and associate lecturer in surgery at the University of the West

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<sup>1</sup>. **Factortame Ltd and others v Secretary of State for the Environment, Transport and the Regions (No.2)** [2002] 4 All ER 97

Indies. This shows that he has the relevant expertise required to give evidence to the court as regards the nature of the claimant's injury to her spinal cord and will be able to assist the court to resolve the issue of causation and quantum.

**[23]** Mr. Neale's submission is that Professor Dr Holness' expertise is not being questioned. Professor Dr Holness has also demonstrated that he is able to perform his duty to the court. At the end of his reports, he indicated that he understands his duties to the court as set out in rules 32.3 and 32.4 and have complied with those duties. As required by CPR 32.13(2)(d) he also indicated that all matters within his expertise have been given together with all details which may affect the validity of the medical report. Throughout the medical reports, Dr Holness has indicated objectively his findings following his assessment of the claimant and there is nothing to show that he would be unable to perform his duty to the court if his reports are admitted.

**[24]** If the expert report dated January 19, 2017 is to be excluded from evidence, the court would be deprived of Dr Holness' reviewed and specific impairment rating of 30% and his reasons for choosing that rating using the 6<sup>th</sup> edition of the "*AMA Guidelines to the Evaluation of Permanent Impairment*" as opposed to the 5<sup>th</sup> edition which he mistakenly used to provide the rating range of 30%-45%. The January 19, 2017 report provides the court with a clearer picture of the severity of the injury sustained by the claimant and in this regard, goes further than the other medical reports to assist in the determination of the issues relating to the claimant's injuries. The exclusion of the expert report dated April 21, 2017 would deprive the court of the latest report on the claimant's medical condition. The medical report which precedes the last medical report of the claimant was obtained in 2013, that is, four years before the last medical report. The claimant's medical progress in those years are therefore crucial to the courts proper determination of the issues. The earlier medical reports do not assist the court in this regard.

**[25]** Dr Cheeks in his medical report dated September 8, 2016 commences thus: "Having read the reports submitted by Drs Holness and Cheethirala and I make

the following comments...” Dr Cheeks’ report is a commentary on the medical reports submitted by both doctors and not on a physical examination of the claimant which must limit the evidence he can give in relation to the claimant’s injuries and matters arising therefrom. Professor Dr Holness has physically assessed the claimant since the day after the accident. He has also seen her on several occasions following. His report would then be of better assistance to the court in understanding the claimant’s condition as early as the day after the accident. The same day that she was admitted to the Cornwall Regional Hospital after transfer from the Noel Holmes Hospital.

## **Conclusion**

[26] There is insufficient evidence to show that Professor Dr Holness has crossed the line, is biased and unable to perform his duties to the court. He has demonstrated his expertise and that he understands his duty to the court. The alternative choices open to the court do not provide the court with the claimant’s latest medical condition and with a range of the claimant’s impairment based on the 6<sup>th</sup> edition of the *AMA Guidelines to the Evaluation of Permanent Impairment*, for the court to make a proper assessment and rule on the issues. Accordingly, the expert reports of Professor Dr Holness should be admitted into evidence. It is for the trial judge to determine the weight that will be given to the expert report having regard to the other evidence that is presented at trial.

## **ORDER**

- (2) Notice of Application for Court Orders dated and filed May 1, 2023 is refused.
- (3) The medical reports of Dr Renn Holness dated January 19, 2017 and April 21, 2017 are to be admitted into evidence at the trial.
- (4) Matter proceeds to trial on the 22<sup>nd</sup> of May 2023.
- (5) Costs of the application to the claimants to be taxed if not sooner agreed.

- (6) Claimant's Attorney-at-law to prepare file and serve orders herein.