



[2026] JMSC Civ 77

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2023CV03100

BETWEEN	CHARLANE SMITH-BRYCE	CLAIMANT
AND	TASHEKA THOMPSON	DEFENDANT

IN CHAMBERS

Henroy Samuels instructed by Linda Wright & Associates, Attorneys-at-law for the Claimant

Suzette Campbell instructed by Burton-Campbell & Associates, Attorneys-at-law for the Defendant

Heard: 15th April and 19th June 2026

Civil Practice and Procedure - CPR 29.17 and 32.13 - Admissibility of expert reports - Distinction between fact and opinion evidence of medical practitioners in personal injury litigation - Hearsay statements in expert reports - Inspection of documents used or mentioned in reports of expert witnesses - Putting questions to expert witnesses

C. BARNABY, J

BACKGROUND

[1] This claim in negligence arises out of a motor vehicle collision on 4th August 2021 in which the Claimant claims she suffered personal injury, among other things. At

a case management conference on 16th January 2025, Dr. Maxim Christmas Orthopedic Surgeon at the University Hospital of the West Indies and Liguanea Pro Medical Centre; and Dr. Courtney Harris Specialist in Family Medicine at Liguanea Pro Medical Centre were certified as expert witnesses in these proceedings on an unopposed application to have them so certified. At that hearing, an order was also made for the Claimant to be examined by a doctor of the Defendant's choosing, as requested by the latter.

- [2] At the further case management conference on 26th May 2025, the Defendant had not availed herself of the opportunity to have the Claimant examined by her own doctor, and had not done so by the date of pretrial review on 29th September 2026. No good reason having been shown on the oral application of counsel to extend the time for the said examination, no extension of time was granted. The Defendant was nevertheless permitted to put written questions to the expert witnesses about their reports within twenty-eight (28) days. A further pretrial review was fixed for 18th November 2025. The Defendant failed to put questions to the experts on their reports.
- [3] During the course of the further pretrial review, Counsel for the Defendant indicated that she had concerns about the reports from the expert witnesses that would affect their admissibility. With a view to ensuring that issues relating to admissibility of expert evidence were addressed before allocating and confirming dates for the trial of the claim, the further pretrial review was fixed for continuation on 11th February 2026 *“for the court to enquire into the medical reports from the witnesses certified as expert witnesses in the proceedings; and determine whether they are to be admitted in whole or part and any consequential steps.”* The parties were ordered to file and serve submissions in these regards.
- [4] Neither party filed submissions. Time having been allocated for the hearing on 11th February 2026 however, the parties were required to make oral submissions. In the course of so doing, Counsel referred to authorities which had not been filed or served. A decision on admissibility of the expert reports was accordingly reserved

to 15th April 2026; and the parties ordered to file and serve authorities relied upon at the hearing and responses to authorities of the opposing party.

[5] On 15th April 2025, I made the following order on the enquiry into admissibility:

1. *With the exception of the words from “History of Presenting complaint” up to “She was seen, sent for a Xray of her back and prescribed panadeine, voltaren, omeprazole and mydocalm” which appear in the report of Dr. Courtenay (sic) Harris dated 12th July 2023, I find that the said report and the reports of Dr. Christmas dated 17th July 2023 and 12th November 2024 are admissible at trial as expert reports.*

[6] Reasons for the decision on admissibility of the various reports were delivered orally, and are now referenced.

Dr. Christmas’ medical report dated 17th July 2023

[7] Dr. Christmas was certified as an expert witness and there is no dispute that fact and opinion evidence given by him would be relevant to the issues in dispute.

[8] Mrs. Campbell submitted that a lot of the matters in the report constitute hearsay evidence and speaks to matters that are not within Dr. Christmas’ personal knowledge, and that he is only allowed to give evidence of matters in his personal knowledge. I do not agree with the submission.

[9] On my review of the report, the “*History of Impairment*”, “*Past Medical History*”, “*Past Surgical History*” and reporting relative to “*Imaging*” by Dr. Christmas admittedly take up a significant portion of his report, but that does not cause me to regard the opinion evidence given by him in his report as inadmissible. The report stated that he saw and examined the Claimant, and that

At the time of preparation of this medico-legal report, I had available to me the medical file of Mrs. Smith-Bryce of Liguanea Pro Medical Centre, plain radiographs done at Apex Radiology, Magnetic Resonance Imaging (MRI)

done at Winchester MRI Limited and a Nerve Conduction Study (NCS) done at Centre for Electrodiagnosis of Neurological Disorders.

- [10] The language used by Dr. Christmas in setting out the history of impairment indicates that the matters recounted were told by the Claimant. Other aspects of the history recounted in the reports are referable to material and documents which he said he had available to him at the time of preparation of his report.
- [11] Statements made by a claimant to an expert witness, and which are attributed, are permitted to be recounted by the expert witness in his report. Such statements are admissible, not to prove the truth of what is recounted, but to explain the basis for the expert witness' opinion. In this regard, see **Cherry Dixon-Hall v Jamaica Grande Limited** Supreme Court Civil Appeal No. 26/2007 delivered 21st November 2008 and **Natasha Clarke v Jacinth Morgan-Collie and Shawn Collie** [2018] JMSC Civ 122.
- [12] A like view is to be taken of material such as a medical file and the results of diagnostic tests and imaging which were provided to the expert witness and used or considered in preparation of his report. This is subject of course to the requirement that the source of the information and documents referenced and/or used are also disclosed and made available for inspection. I arrive at this conclusion in consideration of CPR rule 32.13, which provides that an expert witness's report is to give details of any literature or other material used in making the report, say who carried out any test or experiment which the expert witness has used, and give details of the qualifications of the person who carried out the test or experiment. Where the expert report refers to photographs, plans, calculations, survey reports or other similar documents, these must be provided to the opposite party. When I consider the report, I do not find that these rules are offended.
- [13] As earlier indicated, the report also goes on to indicate that the Claimant was in fact examined by Dr. Christmas who made observations of her, which are admissible as fact evidence. Dr. Christmas also goes on to provide a current diagnosis and a

prognosis for the Claimant. No disability rating has been supplied on the indication that the Claimant is still undergoing treatment, is awaiting surgical intervention and had not yet attained maximum medical improvement. While he refers to matters told to him by the Claimant and matters which appear on material available to him at the time of preparation of his report, it does not appear to me that reliance on them - as thoroughly as they have been recounted - goes beyond the provision of material and context which explains the basis for the opinion evidence given in the report.

- [14] Dr. Christmas' report gives fact as well as opinion evidence. That is entirely permissible.
- [15] As it relates to the complaint of Mrs. Campbell that there was non-disclosure of documents referenced in the report, rule 32.13(4) provides that “[w]here an expert report refers to photographs, plans, calculations, survey reports or other similar documents, these must be provided to the opposite party at the same time as the service of the report.” Where it is not practicable to provide a copy of the documents, they are required to be made available for inspection within 7 days “of a request to do so” pursuant to rule 32.13(5). If any of the documents referred to by Dr. Christmas is not attached to his report, it is open to the Defendant to request inspection of such documents. There is no evidence of that being done. In the circumstances, the complaint of non-disclosure does not render the report inadmissible as an expert report.
- [16] The complaint that Dr. Christmas did not carry out some of the tests or the examinations referenced, or that he does not disclose any literature used are also without merit.
- [17] The “tests/examinations referenced” are diagnostic and the doctor states the entity at which they were conducted in identifying the documents which he had available to him. Such references together with production of diagnostic and imaging results demonstrate sufficient compliance with rule 32.13(1)(c) in my view.

[18] As to literature consulted, the expert witness is required by rule 32.13(1)(b) to “give details of any literature or other material which the expert witness has **used** in making the report”. [Emphasis added] Unless the doctor used literature or other material and has failed to disclose them in preparing the report, of which I have no evidence, I find the complaint to be without merit. In any event, some expert opinions may indeed be based on a medical practitioner’s learning and practice in a particular field and is not rendered inadmissible, only on account that the expert does not also cite literature or other material in support, in his report.

Addendum to Medicolegal Assessment dated 12th November 2024

[19] Dr. Christmas repeats the contents of his medical report dated 17th July 2023 and follow them with an “*Addendum*”. Mrs. Campbell makes the same observations as she has of the initial report, but for reasons already stated, I find the complaints to be without merit. When that is considered together with Mrs. Campbell’s indication that there was no difficulty with the matters set out in the report from the “*Addendum*” onward, I do not have any basis for concluding that the medical reports of Dr. Christmas are inadmissible in these proceedings as expert reports.

Report from Dr. Harris dated 12th July 2023

[20] Mrs. Campbell’s complaints in respect of Dr. Christmas’ reports are also made of Dr. Harris’ report.

[21] There is merit in the complaint that portions of the report contain inadmissible evidence.

[22] While Dr. Harris examined the Claimant, in setting out the “*History of Presenting Complaints*”, which includes reference to initial presentation and treatment at the Kingston Public Hospital (KPH), the source of the matters recounted is not

disclosed and it is not evident that Dr. Harris perceived these matters for himself. I accordingly find those statements inadmissible in their current form.

- [23] With the above exception, I find that the rest of Dr. Harris' report would be admissible.
- [24] Further, Dr. Harris does state at the end of his report that it was compiled after three (3) interviews and examination of the Claimant. In the circumstances, it is my view that the source for the history of presenting complaint can be addressed by written questions to Dr. Harris, pursuant to CPR rule 32.8(2).
- [25] It was also submitted by Mrs. Campbell that Dr. Harris' report does not state when the Claimant first presented to him for care. That complaint is without merit. While not stated at commencement of the report, it is indicted in the body that the Claimant visited the office on 16th August 2021 "*for further care*". This was some twelve (12) days after the collision the subject of the claim. Dr. Harris indicates that he examined the Claimant and made stated observations and findings set out in the report.
- [26] The Claimant was treated by Dr. Harris and was advised that if her symptoms worsened she was to seek medical care at hospital or return. He also indicates that she was sent for MRI of the lumbo-sacral spine (L5), x-ray of her coccyx and abdomino-pelvic ultrasound for her urinary system and provides opinion evidence. He also indicates that the Claimant is being co-managed with the orthopaedic surgeon, neurosurgeon, physical therapist and himself. While there are aspects of the report which could undoubtedly benefit from questions in clarification, I do not believe this causes his opinion evidence to be inadmissible.
- [27] Dr. Harris, as a treating physician therefore gives fact as well as opinion evidence. As I have found in respect of Dr. Christmas, this is permissible.
- [28] In respect of the complaint about non-disclosure, as observed of Dr. Christmas' report, it was open to the Defendant to request inspection of any document

referenced by Dr. Harris which she says he has failed to disclose. Save for a request for specific disclosure of the medical report from the KPH which was ordered and complied with, there is no evidence of any request for production of documents referred to in the reports of the expert witnesses. The complaint as to non-disclosure is without merit and does not move me to regard Dr. Harris' report as inadmissible.

[29] The complaint that Dr. Harris did not carry out some of the tests or the examinations referenced or that he does not disclose any literature used are also without merit. The "*tests/ examinations referenced*" are diagnostic and are attached to the report. As I observed of Dr. Christmas, unless Dr. Harris used literature and has failed to disclose it in preparing his report, of which I have no evidence, there is no basis to refuse to admit his evidence for this reason. In any event, when I consider the opinion evidence that he does give as to the effect of injury found, it does not appear to be outside of the realm of expertise of a medical practitioner.

[30] In all these circumstances, with the exception of the "*History of Presenting complaint*" set out in Dr. Harris' report, I can see no reason to refuse admission of the remainder of the medical report of Dr. Harris and the reports of Dr. Christmas as expert reports. As with any other case, the trial judge will be called upon to make a determination of the case on the evidence as proved by taking into account the evidence presented in totality. In discharge of this responsibility, the trial judge will consider the weight to be given to the opinion evidence of any of the doctors admitted as expert witnesses in the proceedings.

[31] Following delivery of the oral reasons for the decision on admissibility, Counsel for the Defendant applied for leave to appeal. After hearing oral arguments in this respect, these additional orders were made.

2. *The parties are to file and serve submissions addressing the following authorities to which they were referred by the court on or before 15th May 2026:*

Gall v Chief Constable of the West Midlands [2006] EWHC 2638 (QB)

Kirkman v Euro Exide Corporation (CMP Batteries Ltd) [2007] EWCA Civ 66

Victoria Grant et al v Noranda Jamaica Bauxite Partners et al [2022] JMSC Civ 218

3. *A decision on the oral application for leave to appeal the above order is reserved to 19th June 2026¹ at 12:00 noon for forty (40) minutes, which is the date for continuation of the Pretrial Review.*
4. ...

APPLICATION FOR LEAVE TO APPEAL

[32] The grounds on which Mrs. Campbell sought leave to appeal the decision are that I erred:

- (i) in finding that an expert witness does not have to confine himself to giving evidence on matters within his own personal knowledge and based on his own examination; and
- (ii) in finding that the complaint in respect of disclosure of documents referenced in the expert reports did not prevent the reports being admitted as expert reports, in circumstances where the reports were not previously admitted.

[33] The first ground concerns the nature of expert evidence and the second, the time of engagement of the right to request inspection of documents referred to in an expert report under CPR rule 32.13(5).

¹ Earlier dates offered by the court were inconvenient to one Counsel.

[34] On consideration of the arguments made orally, the written responses to authorities to which the parties were referred and for reasons set out below, I find that the application for leave to appeal the decision on admissibility should be refused.

Ground i: Nature of expert evidence

[35] It was submitted orally by Mrs. Campbell that she wished to challenge in the Court of Appeal the finding that the expert witnesses do not have to confine themselves to giving evidence on matters which are within their own personal knowledge and based on their own examination.

[36] She also expressed the view that Dr. Christmas' report is replete with information from other sources, which are so intermingled and mixed with his own findings which makes it unclear what is his evidence before the court. She submitted that this is identical to the **Cherry Dixon case** where the judge could not decipher what came from the witness' own knowledge or from the knowledge of others. She also submitted that the situation is similar to that which existed in **Jhamiellah Gordon v Jevon Paul Devere Chevannes** [2012] JMCA Civ 41. It is submitted that Dr. Christmas' report is contrary to the principle that one can only give evidence of what is in one's personal knowledge.

[37] Mrs. Campbell also submitted that the injuries in the reports are serious and assessment of damages on them would cause the policy limit to be exceeded and the Defendant would need to pay out of pocket. She accordingly wishes the issue to be settled by the Court of Appeal as to whether an expert witness can give evidence of matters not in his own knowledge.

[38] In response, Mr. Samuels submits that the **Natasha Clarke case** makes it clear that a doctor can recount what a patient says or reports to him, to assist in explaining the basis for any opinion given. He argues that there are certain subject elements outside of the doctor's knowledge which would assist him to form his

opinion. He contends that the trial judge can look at all of the evidence and determine what weight can be placed on the evidence.

[39] While he concedes that Dr. Christmas could have been more concise in how he presented the history, Mr. Samuels submits that the history given is still relevant. He referenced the fact that both Dr. Christmas and Dr. Harris conducted their own examinations of the Claimant and had the benefit of objective tests and findings, and used them to form their opinions.

[40] Mr. Samuels goes further to submit that the **Cherry Dixon case**, or other cases relied upon by the Defendant do not advance her position.

[41] In written response to the authorities of **Gall v Chief Constable of the West Midlands** [2006] EWHC 2638 (QB), **Kirkman v Euro Exide Corporation (CMP Batteries Ltd)** [2007] EWCA Civ 66, and **Victoria Grant et al v Noranda Jamaica Bauxite Partners et al** [2022] JMSC Civ 218, the following is submitted on behalf of the Defendant.

(i) The appointment of Dr. Christmas and Dr. Harris as expert witnesses was wrongly made and can only be corrected by way of appeal.

(ii) Both Dr. Christmas and Dr. Harris are witnesses of fact as they each examined and were involved in the Claimant's treatment; and that their "*opinion*" evidence as to what they believed the proper course of treatment should be and the likely outcome of such treatment is not expert evidence since it is only their personal observation. The decisions in **Shawn Baboolal v Maraj Woodworking Est. & Company Limited** Claim No. CV2017-02082 an unreported decision of the Trinidad and Tobago High Court delivered 13th January 2020, a copy of which was not provided to the court, and the **Kirkman case** were cited in aid for these propositions, and in contending that "*opinion*" given by the doctors in those cases as to what they would have

done in treating the claimants and the likely outcome of treatment were deemed fact and not expert evidence.

- (iii) Since the doctors are witnesses of fact, evidence in their reports must comply with the requirements applicable to witnesses giving factual evidence. It is therefore submitted that Dr. Christmas and Dr. Harris can only give evidence which is within their personal knowledge based on their examination of the Claimant on the basis of the **Noranda case**; and the portions of the reports that are not based on the personal knowledge of the doctors are to be redacted from their reports.
- (iv) Even if the doctors are being treated as expert witnesses, their reports can only contain information relevant to issues in dispute. It is submitted that the medical reports contain substantial evidence in relation to the state of the Claimant's medical health and which are unrelated to the accident. This dicta from the **Jhamiellah Gordon case**, which was cited in submissions and considered but not referenced in the oral reasons for decision on admissibility, was prayed in aid.

[8] ... It may well be that although the witness qualifies as an expert, the material to be introduced into evidence is wholly irrelevant to the issues for determination at the trial. In such a situation, a party would be properly prevented from calling a witness who would merely be causing a lengthening of a trial, as well as, the incurring of unnecessary costs...

- (v) The reports of Dr. Christmas make mention of injuries to the Claimant when he saw her two (2) years after the accident which were not contained in her original medical assessment. The decision in **Anthony Brown and Ambucare Company Limited v Clifton Willimans** Supreme Court Civil Appeal No COA2023CV00012 delivered orally on 4th December 2025 and contained in *Notice to Parties of the Court's Memorandum of Reasons for*

Judgment is cited in contending that such evidence ought not to be considered.

- [42] The submissions made at (ii) to (iii) go to the nature of expert evidence and concern the distinction to be made between medical practitioners as fact witnesses and/or expert witnesses and are within the parameters of the ground advanced for leave to appeal. Those made at (i), (iv) and (v) do not arise on either ground orally advanced by Mrs. Campbell for leave to appeal, but they will nevertheless be addressed for completeness and to avoid a satellite hearing for their further consideration.
- [43] In further resisting the application for leave to appeal, Mr. Samuels in the written submissions filed on behalf of the Claimant submits that the decisions in **Gall**, **Kirkman** and **Victoria Grant** clearly show that the law does not support the Defendant's submissions, the main thrust of which is that the medical reports contain hearsay evidence and are inadmissible; and that evidence of expert witnesses in personal injury matters must be limited to information within their own knowledge based on their examination and diagnosis.
- [44] Relying on the **Gall case**, Mr. Samuels goes on to submit that Dr. Christmas and Dr. Harris, in addition to being fact witnesses who have treated the Claimant have also provided opinion evidence, and is permitted to give evidence in both regards, they having been certified as expert witnesses. It is further submitted in reliance on the **Kirkman case**, that expert witnesses may base their opinions on the findings and examinations of other medical practitioners and are not confined only to matters within their personal knowledge. Mr. Samuels also submits, on the basis of the decision in the **Victoria Grant case**, that doctors who are fact witnesses solely, are limited to presenting evidence of matters within their own knowledge.
- [45] For reasons set out below, I do not find favour with the submissions advanced by Mrs. Campbell on behalf of the Defendant.

- [46] The general rule, pursuant to rule 1.8(7) of the **Court of Appeal Rules, 2002** (*the Appeal Rules*), is that permission to appeal civil cases will only be given when the court below or the appellate court considers that an appeal will have a real chance of success. Mrs. Campbell's contention that the injuries in the reports are serious and that assessment of damages on them would cause the policy limit to be exceeded so as to require the Defendant to pay out of pocket does not warrant a departure from that general rule.
- [47] Although not among the grounds articulated on the oral application for leave to appeal, I will briefly address the contention that the appointment of Dr. Christmas and Dr. Harris as expert witnesses was wrongly made and can only be corrected by way of appeal. I find no merit in the submissions. Both doctors were certified as expert witnesses over a year ago at a case management conference on 16th January 2025, on an unopposed application in that regard. No evidence has been presented to this court which demonstrates that they then lacked or now lack the qualifications and independence to be so certified, or that their field of expertise is not established and reliable. Further and in any event, having regard to the date on which the decision was made to certify them as expert witnesses, leave to appeal that decision outside of the time limited by rule 1.8 of the *Appeal Rules* would be required and has not been sought by the Defendant to warrant any further consideration of the argument.
- [48] In respect of the view that Dr. Christmas' report makes it unclear as to his evidence, I also find it to be unmeritorious for the reasons already indicated in ordering his reports admissible. Additionally, the report is clearly ordered, including through the use of subheadings which make it clear when the doctor is referring to historical matters, examinations, observations, conclusions reached by him and opinions which he has formed. The **Cherry Dixon-Hall** and **Jhamiellah Gordon cases**, which are factually distinguishable, do not assist the Defendant. In fact, the very authorities demonstrate the unworthiness of the Defendant's submission that the

reports of expert witnesses are to be limited only to matters within their personal knowledge.

- [49] In the **Cherry Dixon Hall case**, the admissibility question which concerned the Court of Appeal related to the finding of the trial judge that medical evidence which was entered into evidence by the consent of the parties was inadmissible. On the ground of the well-established principle of the law of evidence that no evidence is required of matters which are formally admitted, the court found that the trial judge erred in respect of that finding. It was accordingly concluded that it did not matter that the doctors had given opinion evidence but were not appointed as expert witnesses. The reports having been admitted in evidence by consent, the trial judge was required to assess them and determine what weight should be given to them, an altogether different consideration from whether expert reports are admissible.
- [50] In the **Jhamiellah Gordon case** the Court of Appeal found, in allowing the appeal in part, that the first of the doctor's reports breached the rule against hearsay entirely, in that it was not based on an examination done by her but was based exclusively on the examination and findings of others. The court found that she could not be regarded as an expert witness in respect of that report and that the report was wholly inadmissible. As it relates to her second report, it was found that the doctor may properly be called as an expert witness in respect of those portions of it where she stated that she examined the appellant and sets out her findings and recommendations.
- [51] In the instant case, both Dr. Christmas and Dr. Harris saw and examined the Claimant, made observations of her, indicated their findings and gave opinion evidence. While they each refer to diagnostic and imaging reports/results, and Dr. Christmas had available to him the Claimant's medical file to which reference was made, that does not cause their evidence to be inadmissible.
- [52] It is neither unusual nor undesirable for expert witnesses to refer to and use literature, other material, tests or experiments, and documents in making their

reports. This is clearly contemplated by the rules of court which do not prohibit their use but require expert witnesses to give details of the literature or other material used in making their reports, give details of who carried out any tests or experiments and their qualifications, and to disclose photographs, plans calculations, survey reports or other similar documents, pursuant to CPR rule 32.13.

[53] As it pertains to other matters outside of a medical expert witness' personal knowledge such as recounting of historical matters - including of the circumstances which caused engagement of the expert witness and/or of past maladies - I think it is well settled that while information so rehearsed and properly attributed are not admissible to prove the matters relayed, the medical practitioner is permitted to include information so told in his report to explain the basis for his opinion. This is evident on the dicta of Harris JA at paragraph 38 of the **Cherry Dixon-Hall case**.

[54] The learned editors of **Phipson on Evidence**² para 33-09 quite helpfully put it this way.

Where the opinion of experts is based on reports of facts, those facts, unless within the experts' own knowledge, must be proved independently. An expert's evidence is necessarily founded on his training and experience, both of which involve the acceptance of hearsay information. It is, however, permissible for him to give an opinion on the basis of such hearsay, provided that it relates to specific matters of which he does have personal knowledge, or of which admissible evidence will be given by another witness. He cannot give evidence of any particular transaction if he has no personal knowledge of it, though that does not mean that he cannot refer to such transactions as the basis of his opinion. Thus, a doctor can give evidence of what he was told by a patient about his condition for the purpose of evaluating his diagnosis; though his testimony is inadmissible to show what symptoms were actually being experienced by the patient.

² Hodge M Malek (ed), *Phipson on Evidence* (19th edn, Thompson Reuters 2018)

- [55] In fact, where a medical practitioner who is an expert witness fails to state that a claimant gave history which is relevant to any opinion expressed by him in his report, the court can properly reject the opinion evidence as happened in the **Cherry Dixon-Hall case**. In that case, a Dr. Williams had given opinion evidence of a causal connection between the appellant's fall and recurrent lupus flare ups. While the appellant declared in court proceedings that she was diagnosed with lupus prior to the accident, Dr. Williams failed to state in his report that she had given him any history of her past malady, which led the Court of Appeal to regard the contents of his report as conjecture and speculative. It was accordingly determined that the trial judge had properly rejected Dr. Williams' evidence and preferred the other medical evidence of injuries which were reasonably foreseeable as a result of the appellant's fall.
- [56] In respect of the submissions that relate to the contention that Dr. Christmas and Dr. Harris are witnesses of fact because they were involved in the examination and treatment of the Claimant, thereby rendering "*opinions*" expressed by them in their respective reports as fact and not expert evidence, I am unable to agree with the submissions and the entreaties premised on them. I find the three authorities to which the parties were invited to make written submissions instructive in these regards.
- [57] In the **Kirkman case** the appellant was previously involved in a motorcycle accident in 1994 and on investigation of his knee, a diagnosis was made of damage to the anterior cruciate ligament. He was referred for treated by Dr. Banks, a consultant orthopaedic surgeon. The knee problems subsided but reoccurred in 2001. Mr. Kirkman was again referred to Dr. Banks and an appointment was made for 9th October 2001. In September 2001, the appellant had an accident at work and he fell into a hole. His foot became stuck and he suffered a wrenching injury to the right knee for which he attended hospital where he was initially diagnosed with a soft-tissue injury to the right knee. He was treated and told to keep his appointment with Dr. Banks which had already been made as follow-up. On 9th October 2001, Mr.

Kirkman saw Dr. Banks. An MRI scan was ordered and Dr. Banks advised an operation for reconstruction of the anterior cruciate ligament. The operation took place in May 2002 and Mr. Kirkman developed an infection for which he received extensive treatment. Treatment was unsuccessful and he eventually had to submit to an above-knee amputation of the right leg in 2003.

[58] Liability for the accident at work was not disputed but an issue arose as to whether the need for the operation which resulted in the infection was necessitated by the accident at work, or whether Mr. Kirkman would have undergone the operation even if he had not had that accident. He initially instructed Dr. Banks as an expert witness and the doctor's early reports contained both fact and expert evidence. Mr. Kirkman's attorneys determined that they did not wish to rely on Dr. Banks as their expert and by what the court termed a "*rather artificial process*", sought to separate the factual aspects of his report from the expert aspects. To this end, a re-drafted statement was obtained from Dr. Banks which had as its core the statement that if Mr. Kirkman had presented to him in October 2011 and had not recently had an accident, he would not have advised him to undergo a ligament reconstruction. Smith LJ found that this was clearly a statement of fact, being in the nature of what Dr. Banks would in fact have advised, if Mr. Kirkman presented to him and had not recently had the accident at work.

[59] While factually dissimilar to the instant claim, useful guidance may be gleaned from the **Kirkman case** on the distinction between fact evidence and expert evidence given by a medical practitioner in personal injury cases, and the form which expert evidence and reports of expert witnesses might take. The guidance is this.

- i. Evidence from a medical practitioner is exclusively "*fact evidence*" where the practitioner is the treating doctor and is personally cognizant of the medical matters of which he gives evidence. It is my view that this would encompass evidence of the doctor's clinical observations, patient care and treatment provided or advised. The

permission of the court is not usually required for a medical practitioner to give evidence of this kind.

- ii. Evidence from a medical practitioner is exclusively "*opinion evidence*" where it is not based on personal cognizance or knowledge of the facts, but brings to bear the medical practitioner's expertise upon a claimant's condition. Such evidence may be expressed as a view as to what most competent medical practitioners would advise, or what it is probable that an unidentified medical practitioner on whom a claimant attended would advise.

It is my view that this evidence encompasses evidence on medical causation, standard of care, diagnosis and/or prognosis. Such "*opinion evidence*" can only be given by a medical practitioner with the permission of the court.

- iii. A medical practitioner can give both fact and opinion evidence in a single report.

[60] Like all the authorities to which the parties were referred, the **Gall case** is factually dissimilar to the instant. It is nevertheless demonstrative of the principle that where a medical practitioner gives evidence of injuries which he observes, that evidence is to be treated as fact evidence.

[61] In the **Victoria Grant case**, Nembhard, J had to consider whether a Dr. Jones who was not appointed as an expert witness in those proceedings could be treated as a witness of fact. The court determined that he could be, in respect of certain aspects of his evidence. In so concluding, the court considered two case from Trinidad and Tobago to be instructive. Of those cases the **Shawn Baboolal case** has been cited by the Defendant but not supplied. I have nevertheless managed to locate it.

[62] In the **Shawn Baboolal case** cited, the court considered an application from the claimant - filed after a witness statement for the doctor had been filed and served -

for a Dr. Santana, Orthopaedic Surgeon, Diving and Hyperbaric Medicine to be appointed as an expert witness pursuant to rules of court. The application also followed the filing of evidential objections by the defendant that Dr. Santana had not been deemed an expert witness by the court and could not provide opinion evidence on the claimant's purported injury; and that Dr. Santana could only provide evidence as a witness of fact in any event.

[63] In determining whether Dr. Santana was a witness of fact or an expert witness, K. Ramcharan, J at paragraph 6 of his judgment considered the dictum of Archie, CJ taken from lines 42 to 48 of the transcript in **Vanessa Garcia v North Central Regional Health Authority** Civ App 116 of 2011 to be the learning on the point in that jurisdiction. It is this,

"If you are not a doctor involved in the treatment of the patient, then you are not a witness of fact. Anything you say has to be hearsay and is therefore an interpretation of the note, which places you in the category of expert, otherwise it is hearsay and inadmissible. If you were the doctor treating the patient, then you can come out and say 'I did this because'."

[64] Contrary to the submission of the Defendant here that the doctor's opinion evidence was deemed to be evidence of fact, the court actually found that Dr. Santana was not a fact witness as he did not treat the claimant in any way for any of his injuries and had merely given opinion evidence of the claimant's prognosis for the future. Accordingly, the claimant's application to appoint Dr. Santana as an expert witness was granted by the court. The decision accords with the distinction in the **Kirkman case** between evidence from a medical practitioner which is exclusively fact evidence and evidence from such a practitioner which is exclusively opinion evidence.

[65] When the reports of Dr. Christmas and Dr. Harris are considered, it is clear that in addition to fact evidence which arose on their clinical observations, care and treatment provided or advised, they also give opinion evidence on medical

causation and prognosis, which is permissible. They do not generally require the permission of the court to give fact evidence but unless certified as expert witnesses, which they have been, they cannot give opinion evidence in the proceedings.

[66] This conveniently takes me to the submission of the Defendant as to relevance, which I also find unmeritorious. The submission goes, that even if they are to be treated as expert witnesses, the doctor's reports can only contain information relevant to issues in dispute and since the medical reports contain substantial evidence in relation to the state of the Claimant's medical health which are unrelated to the accident the subject of the claim, they should not be admitted. The Defendant does not refer to any matter specifically but on consideration of the reports, references to pre-existing injuries are observed in the histories recounted by the doctors. It is permissible to include such matters in an expert report not in proof of them, but to assist in explaining the doctor's opinion, or as the learned editors of **Phipson on Evidence** put it, "*... a doctor can give evidence of what he was told by a patient about his condition for the purpose of evaluating his diagnosis.*"

[67] As to subsequent injuries found by the doctors, they have been pleaded by the Claimant and disputed by the Defendant in the defence filed giving rise to issues of causation. They are not irrelevant to the dispute so as to make them inadmissible. While there may be legitimate concerns which arise in these regards, they go to the weight, if any, which the court should place on the evidence of the expert witnesses at trial, which is an altogether different matter from whether the evidence is legally permitted in court and therefore admissible.

[68] I arrive at a like conclusion on the submission that the evidence of Dr. Christmas of injuries to the Claimant when he saw her two (2) years after the accident and which were not contained in her original medical assessment should not be considered by the court. The Defendant relies on the decision of the Court of Appeal in the **Anthony Brown case** in so contending. While it was held that the learned trial

judge erred in relying on evidence contained in an expert report based on a single examination conducted four (4) years after the accident and which did not speak to injuries contained in the medical report from KPH which was contemporaneous with the accident, the critical failure was that “... *there was no evidence establishing a nexus between the injuries described in [the expert witnesses’] medical report and the accident on 10 October 2013.*” That defect does not exist on Dr. Christmas’ report.

[69] In all the foregoing circumstances, I do not consider that an appeal against the decision on admissibility of the expert reports of Dr. Christmas and Dr. Harris will have a real chance of success. The application for leave to appeal is accordingly refused.

Ground ii: Engagement of right to request inspection of documents referred to in expert report

[70] Counsel for the Defendant submitted that I erred in concluding that the failure to attach documents referenced in a report by a person certified as an expert witness does not prevent the report being admitted as an expert report because it was open to the Defendant to request that they be produced for inspection, which was not done. I do not believe that this ground has any real prospect of succeeding on appeal.

[71] Pursuant to CPR rule 32.13 (4), where expert report refers to photographs, plans, calculations, survey reports or other similar documents, they are to be provided to the opposing party at the time of the service of the report. While the rule regards simultaneous service and provision of documents referenced as the ideal, there is recognition that this may not always be practicable. Accordingly CPR rule 32.13(5) goes on to prescribe that

Where it is not practicable to provide a copy of the documents referred to in paragraph (4), such documents must be made available for inspection by the other party or any expert witness instructed by that party within 7 days of a request so to do.

- [72]** Additionally, if the documents referenced at CPR rule 32.13 are regarded as belonging to an identifiable class, and the documents which are mentioned in an expert reports do not fall within it, CPR rule 28.17 also provides that a party may inspect and copy a document mentioned in an expert's report. This is done on written notice to the party who, or whose witness mentioned the document. Compliance with the notice is required within seven (7) days after the date on which the notice is served.
- [73]** Neither rule imposes a sanction for the failure to provide the documents referred to or mentioned in an expert report, and there is no practice direction or court order which imposes such a sanction. To find an expert report inadmissible only on account of the failure to provide documents disclosed by reference or mention when the remedy available to the counter party to cure the defect has not been engaged would offend the spirit of the rules.
- [74]** It is observed that neither CPR rules 32.13 nor 28.17 prescribe the time for the making of a request or giving notice to inspect or copy as appropriate, but it is nevertheless my view that the overriding objective of dealing with cases justly would require them to be made and given as soon as possible after reports from persons certified as expert witnesses are served. In any event, if an opposing party intends to ask the court to refuse admission of an expert report on the basis of non-production of documents referenced or mentioned in the report, at minimum, the party should properly engage the remedy given by the rules before making such a request of the court. I come to these views when I have regard to the purpose of expert evidence, that is, to assist the court with matters on which it does not have the requisite specialist or technical knowledge.

REQUEST TO PUT QUESTIONS TO EXPERT WITNESSES

[75] In addition to requesting leave to appeal the decision on admissibility of the expert reports, Mrs. Campbell also asks that the Defendant be permitted to put questions to Dr. Christmas and Dr. Harris on their reports. She reminded the court of its order made on 16th January 2025, whereby a decision on the matter of clarifying questions on expert reports was reserved until examination of the Claimant by a doctor of the Defendant's choosing and the production of medical reports on such examination. Counsel's request ignores the fact that consequent on the repeated failure by the Defendant to have the Claimant so examined, the court at the Pre-trial Review on 29th September 2025, permitted the Defendant to put written questions to the expert witnesses about their reports within twenty-eight (28) days of that date, and that the Defendant failed to avail herself of that opportunity.

[76] Pursuant to CPR Rule 32.8(1), a party may put written questions to expert witnesses instructed by another party or jointly, about their report in order to clarify a report. Such questions *"(2)(c) must be put within 28 days of service of that expert witness's report, unless - (i) the court permits; or (ii) the other party agrees."* [Emphasis added] On consideration of this provision, the putting of questions does not appear to be dependent on the report of an expert witness being ruled admissible as an expert report.

[77] Dr. Christmas and Dr. Harris having been certified as expert witnesses, their reports being available to the Defendant, and the court having ordered that written questions be put to the expert witnesses to clarify their reports within a specified time, the Defendant was required to comply with the order. Not having done so, the Defendant ought properly to have made an application to extend the time to do so. No such application has been made.

[78] Additionally, outside of submitting that the reports were only found to be admissible as expert reports on 15th April 2026 - which is not regarded as a good reason when I consider CPR Rule 32.8(2)(c) - nothing has been presented to the court which

explains the failure to comply with the order to put questions to the expert witnesses on their reports within the period limited. This notwithstanding, Counsel for the Claimant concedes that aspects of the reports could benefit from clarification and does not oppose the request.

[79] Considering the role of expert witnesses in proceedings, the purpose for which written questions are permitted to be put to expert witnesses on their reports,³ the fact that such questions when answered may save time and costs, and having concluded that at least one concern which Counsel for the Defendant has raised can be clarified by written questions to an expert witness in these proceedings, I am minded to extend the time for complying with the court's order to enable the Defendant to put questions to the expert witnesses to clarify their reports.

ORDER

1. The Defendant's oral application for leave to appeal the court's decision on 15th April 2026 in respect of the admissibility of expert evidence is refused.
2. Subject to orders 3 to 5 herein, the medical report of Dr. Courtney Harris dated 12th July 2023, and the reports of Dr. Maxim Christmas dated 17th July 2023 and 12th November 2024, are permitted to be admitted into evidence at trial.
3. The Defendant is permitted to put written questions to the expert witnesses within fourteen (14) days of today's date in order to clarify their respective reports.
4. Each expert witness is to file and serve responses to the written questions put pursuant to order 3, within forty-five (45) days of written questions being so put.

³ See for example **Perrie Daley v Attorney General** [2015] JMCA Civ 11

5. Where the Defendant does not put written questions to Dr. Courtney Harris in order to obtain clarity on the source of the matters set out from "*History of Presenting complaint*" up to "*She was seen, sent for a Xray of her back and prescribed panadeine, voltaren, omeprazole and mydocalm*" which appear in the report of Dr. Courtney Harris dated 12th July 2023, within the time limited by order 3 herein, the Claimant is permitted to file and serve an Addendum to the said medical report to address the issue on or before 9th July 2026.
6. If an expert witness does not answer the written questions put to him pursuant to orders made herein, he will be required to attend the trial of the matter to answer the questions and costs of his attendance for the purpose shall be borne by the Claimant.
7. A further Pretrial Review is fixed for 26th October 2026 at 12:00 noon for one (1) hour.
8. Costs of the enquiry into the admissibility of the expert reports and for today are to be costs in the claim.
9. The term "NEG 1" is to be inserted in the top center of the first page of any documents to be filed, prior to their filing in the Registry.
10. The Claimant's Attorneys-at-law are to prepare, file and serve this order.

Carole S. Barnaby
Puisne Judge